Case No. 88-1309

Supreme Court Of The United States

October Term 1989

STATE OF MINNESOTA, Rudy Perpich as Governor of the State of Minnesota, Hubert H. Humphrey, III, as Attorney General of the State of Minnesota.,

Petitioners,

vs.

JANE HODGSON, M.D., et al

Respondent.

On Appeal from
the United States Court of Appeals
For the Eighth Circuit

BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

By *Amicus Curiæ*:

(1) Should *Roe v. Wade*, 410 U.S. 113 (1973) be reconsidered and discarded in favor of finding that a fetus is a member of Posterity, and therefore a person in the Constitutional sense, and thus entitled to the protection of the Constitution?

As framed by the parties (57 LW 3625):

(2) May state constitutionally require physician to attempt with reasonable diligence to notify parents of unemancipated minor under age of 18 at least 48 hours before performing abortion on their daughter?

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INTEREST OF *AMICUS CURIÆ*

Amicus is an attorney admitted to practice law in the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Brief in *Webster v. Reproductive Health Services*, No. 88-605, decided in this court on July 3, 1989, in support of appellant, and has been granted permission to file

a similar brief in behalf of one other state.[1]. He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copy righted one article on Abortion entitled *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*. He lived four years in England where he engaged in a self directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws of the State of Ohio, but the State of California wherein *amicus* resides, because it effects the rights of persons residing in California, the liability of the state, and its taxpayers, may, or may not, be liable for damages depending upon the scope of rights belonging to a fetus, which in *amicus*' belief constitutes human life protected by the Constitution. It must be remembered that under Nazi Germany, nearly 9 million innocent lives were lost in a holocaust because no one, at the outset had the courage to say no.[2]. If, as contended here, a fetus is a human life, then *amicus* has an interest as a taxpayer to insure that his state's procedures are neither *contra bono mores*, nor illegal.

Amicus is also concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "fetus" and is concerned, and has been concerned for some time, that fetuses,

[1] *Ragsdale v. Turnock*, No. 88-790.

[2] It is certain that the atrocities began at least as early as 1938. 6 Enclopædia Britanica 253a (1971). World War II did not start until September 1, 1939, by the Nazi, with United States entry on December 8, 1941 and then only because of events in Hawaii. 22 Id 681b, following.

have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced, that the court was misled as to the meaning of personhood in that arguably a fetus is a member of Posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States that fetuses be recognized as a member of Posterity, but, until *Webster*, due to the inherent nature of our adversary process, has been limited to writing articles concerning the topic.

It is *amicus*' desire, *pro bono publico*, to present to this court, from the fetus' point of view, the rights of the fetus, as it appears to be found in the term Posterity in the Preamble of the Constitution of the United States of America.

STATEMENT OF THE CASE

Minnesota Statute §§ 144.343(2),(7) (1987) requires a minor to notify both parents at least 48 hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion witout such notification would be in her "best interests." The district court held that the judicial by-pass procedure was unconstitutional because the two-parent notice requirement failed to serve the state's interest in protecting pregnant minors or promoting family communication and that the 48-hour waiting period requirement was unreasonable under conditions existing in Minnesota. A panel of the Eighth Circuit affirmed, and the Eighth circuit granted a hearing *en banc*. The court, en banc, held that the notice by-pass provisions were constitutional, but left in tact the holding that the 48 hour provision was unconstitutional.[3] *Hodgson v.*

[3] Plaintiffs, respondents in this court, have cross petitioned in *Hodgson*

Minnesota, 853 F.2d 1452, 1453 (1988)

The statute, Minn.Stat.Ann. 144.343 (1981) deals with a minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse. Subd. 2 provides that no abortion may be performed upon an unemancipated minor until at least 48 hours after written notice to her parents, and provides the mechanics for giving notice. Subd. 6 provides that if the notification procedures of subd. 2 is restrained by judicial order, then a pregnant minor has the choice of either providing notice in subd. 2 or submitting to a court by-pass procedure. The by-pass procedure provides for an expedited procedure wherein a judge may authorize an abortion without consent to the parent if the judge determines that "the pregnant woman is mature and capable of giving informed consent," or or an abortion without notice would be in her "best interests." "Parent" is defined in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living, or if the second one cannot be located through reasonable diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 5 is a penalty provision wich subjects one performing an abortion in violation of the statute to criminal penalties and civil libility. There are exceptions to the notice requirement and a severability provision.

The statute was to become effective on August 1, 1981, but enjoined on July 30, 1981 by the trial court at the request of Plaintiffs, respondents in this court, which consist six class action minors seeking abortions who claim to be mature and that notification of one or both of their paretns of their desire to have an abortion would not be in their best interests; a mother of one of the minor plaintiffs alleging that notification of the father was not in the minor's best interests; and four clinics and two physicians performing abortions in Minnesota.

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v. Minnesota, 88-1125.

The court of appeals upheld the trial court's finding that subd. 2 was unconstitutional because an alternative to parental notification was required by precedents of this court, but that the judicial by-pass procesures were good. 853 F.2d, at 1456, citing principally *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 633-39 (1979) and *Planned Parenthood v. Ash-croft*, 462 U.S. 476, 490-93 (1983). Turning to the trial court's finding that the two-parent notification requirement was burdensome, and therefore the statute as a whole was unconstitutional, the court of appeals reversed finding that while the two-parent notification requirement was somewhat of a burden, the burden was relieved by the judicial by-pass procedures, and therefore valid. 853 F.2d at 1462. Similarly, the court of appeals rejected the trial court's finding that the 48-hour waiting period resulted in too long a wait, up to a week, by noting that most abortions are not scheduled for at least two or three days, and there was no limitations on sending the notice the same date that an abortion is scheduled. 853 F.2d 1465.

Minnesoto seeks review of that portion of the opinion invalidating subd. 2 which requires the physician to give parental notice at least 48-hours in advance without the availability of an alternative by-pass on the basis that the statute does not give the parent a veto power, it only requires notification, and therefore a judicial by-pass to obtain consent is not necessary.

SUMMARY OF ARGUMENT

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. While the Preamble of the Constitution does not create

any rights, it defines for whom the rights were created - Ourselves and Our Posterity, and a construction that Posterity includes fetuses is consistent with the intent of the framers and the common law understanding that a fetus was a person in being, such that a fetus is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, *Roe v. Wade* must be overruled as unsound and contrary to the intent of the framers.

3. Because a fetus is human life and a person in the constitutional sense, and the state has a valid and legitimate right to protect human life, recognized as an international duty, and imposed as a duty in the Constitution of the United States, subdivion 2 is reasonably necessary by the state for the protection of both the mother and the fetus by insuring there exists a mechanism for compelling the report of statutory rape or incest.

Based upon the foregoing, this court should *overrule Roe v. Wade*, 410 U.S. 113 (1973) prospectively, *reverse* the decision of the Eighth Circuit at 853 F.2d 1452 as to the constitutionality of subdivsion 2 of Minnesota Statute §§ 144.343 (1987), and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I

STARE DECISIS IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown III*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown III*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 289, 294, 298 (Nature of remedy to be utilized).

Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country, abortion controversy has led to disorder in the streets.[4]

This court, with the characteristic good grace it exhibited in *Garland*, should now recognize, for reasons which will become apparent hereinafter, that in *Roe v. Wade*, 410 U.S. 113 (1973) it was misled, *overrule* it prospectively,[5] and remand for

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[4] It is not suggested that the disorder is the reason for overruling Roe. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

[5] The Eighth Circuit found that certain issues were moot and did not reach them. However, it is evident that Appellants were forced to concede they were foreclosed from enforcing the Statutes and regulations based on decisions relying primarily on *Roe v. Wade*. Therefore, this court should disapprove of all of those cases found at 841 F.2d, at 1364-66 which have

further proceedings in light of the fact that the fetus is, by virtue of the term Posterity, found in the Preamble of the Constitution, a person in the Constitutional sense.

II

A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION

A. Introduction - *Roe v. Wade* Did Not Consider Posterity.

This court in *Roe v. Wade*, 410 U.S. 113 (1973), *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the fetus was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term person as found in the 5th and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United State. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

In at least one subsequent opinion, this court has held that the right of privacy cannot be used by consenting adults in the

held that Illinois cannot enforce its statutes on the same basis, and remand for reconsideration of this Court's opinion, or outright.

privacy of their own bedroom to engaged in homosexual conduct forbidden by State Law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). No reported case has ever held that a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse of taking the life of a fetus in violation of state law.

This court, just this term, *Webster v. Reproductive Health Services*, 88-605 (July 3, 1989), held that the statutes therein which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. In doing so, it was noted that the decision all but wipes *Roe* off the books as an unconditional right to an abortion. Id. slip opinion, concurring Opinion of Scalia, J., p. 1.

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created

The Preamble's true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf., Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7. That aside, it does define for whom the constitution was created, and where sovereignty resides. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[6] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

C. The Constitution was Established "By The

[6] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

People"[7]

The Constitution,[8] in the Preamble, declares that "We the People" do ordain and establish this Constitution. "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservation, 'We, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a

[7] Recorded history first notes that a sovereign rules with the consent of the governed in I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when the rest of Israel were doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

[8] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Wcat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 313 U.S. 299, 316 (1941).

better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treatise of ethics than a constitution of government." Hamilton, The Federalist Papers, No. 84.; Preamble, *Amicus* Appendix, p. A8.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold power and conduct the government through their representatives. They are what we familiarly call the "sovereign people" and every citizen is one of these people, and constituent member of this sovereignty. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);" *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity"

There being no debate, and the question of the meaning "to ourselves and our Posterity" being one of first blush, we must turn to the meaning commonly understood at the time of the adoption to determine its extent and application. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852).

The phrase in question begins with the preposition "to". As so used, it marks the object for which the purposes were

[9] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

secured. Webster's Dictionary of the English Language, 1968.

"Ourselves" is a pronoun, the plural of "ourself", and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to "we" or "us". *Ibid.* "We", in this case, appears at the beginning of the preamble and is defined by the parenthetical statement immediately following "the People of the United States." "Ourselves" is therefore synonymous with "the people of the United States" and hence also "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

"And" is a particle joining words and sentences, and expressing the relations of connection or addition. Webster's, op. cit. In this case, its purpose is to add to the object for which the purposes were secured. "Our" means of, or belonging to, "us", i.e., to the speaker (in this case "We, the People of the United States), or to the speaker and the person or persons whom he speaks for or includes. It is a possessive adjective corresponding to "We", "Us"; expressing the genitive of possession; also, the objective genitive, as in "our defense", "our Maker", "our persecutors". Oxford English Dictionary, Compact Edition, 1971. (Hereinafter, OED). Its purpose is to include "Posterity" on an equal footing with, and the same rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity" is synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations

Posterity, as it appears in the Preamble, has not been defined by the Supreme Court, therefore we must turn to what the framer's understood it to mean at the time the constitution was adopted in 1789. *Ante*, footnote 8, and the citations therein. "Posterity", at the time of the Framers, was defined as "1. The descendants collectively of any person; all who have

proceeded from a common ancestor. 2.+.a. A later generation (with plural). obs. b. All succeeding generations (collectively)." OED, op. cit. *Accord, Breckenridge v. Denny*, 71 Ky (8 Bush.) 523. The Preamble is not concerned with an individual in particular, as in 1. Nor in the sense of 2.a, which in any event is obsolete. 2b appears to be the sense which the framers had in mind. Samuel Johnson, "Idler No. 3", p. 5, used it in that sense in 1758 when he wrote, "The Ocean and sun will last our time, and we may leave posterity to shift for themselves." It was again used in that sense by Colquhounn in Commentaries on the Thames, ix, 284 when he wrote in 1800 "They will deserve the Thanks of the Nation, and the gratitude of Posterity." OED, op. cit.

The Constitution was signed on September 17, 1787, and Congress on February 18, 1791 formally recognized that the states had ratified the Constitution and therefore it was in effect. 3 Rotunda, Treatises on Constitutional Law, pp. 663-64, note 1. Thus it may be assumed the same sense was intended. *Ante*, footnote 8, and the citations therein.

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition.

The Framers used the term Posterity without qualification. In 1644, in a well known pamphlet, it was argued that Parliament can no more censure the issue of the mind than it can the issue of the womb." Milton, John, "Aeropagitica" (1644).[10] At common law, it was understood that certain members of future generations, fetuses,[11] were a life in being for the pur-

[10] Milton went on to observe that he did not believe that his remarks applied to Catholics. While this Catholic takes exception to the exception, his premise appears sound in all other respects. It may be that today he would have different feelings on the matter.

[11] That a fetal has rights was probably recognized as early as 322 BC at least. Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118, a. 2; Noonan, Contraception, 86-88 (Harv. U. Press,

poses of the Rule Against Perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). Moreover, prenatal injuries, were to a limited extent, recognized at Common Law. "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198.[12] And common law does not appear to have barred tort actions for prenatal injuries. *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960).

It thus appears that the framer's intended that "All succeeding generations (collectively)" include common law concepts of the rights of a fetus and to be synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers.

As the Preamble appears to confer rights upon "posterity" equal to "our selves", it is necessary to determine whether the framer's[13] intended that the rights be vested. Ante, footnote

1965). The Old Testament provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious beliefs. *Generally, Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[12] Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices.

[13] Of the 39 signers of the constitution, at least 8 were lawyers (of

8, and the cites therein. One measure of intent would be to determine whether vesting has occurred for the purpose of the rule against perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation. But such a concept would have been inconsistent with the concept of "unalienable rights" found in the Declaration of Independence[14] and the concept of an "indestructible and perpetual union." *White v. Hart*, 80 U.S. (13 Wall.) 646, 650. Therefore, the framer's must have had a different intent in mind when they used "Posterity."

If "Posterity" is to be viewed as conferring a contingent remainder to a class, then it must fail for being obnoxious to the rule against perpetuities because there would be members of the class capable of taking more than 21 years, plus the gestation period, after lives in being. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). But if void, then it would create a fee simple absolute in the present generation, thus, once again, frustrating the intent of the framer's in creating "unalienable rights" and a "perpetual union". Therefore,

which one studied at the Middle Temple in London England and another studied law in England), two more appear to have studies law extensively (Chs. C. Pinchkney at the Middle Temple in London, England), and two more were, or became, judges. Generally, Encyclopaedia Britannica (1971) (Comparison with signers Volume 22, p. 695, with their biographies.). Hence it is fair to assume that the framer's were not unaware of what they were doing, and how to secure that which they wished to do.

[14] American Declaration of Independence; Schwartz, The Bill of Rights, A documentary history. The Declaration states, in relevant part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, ¶ 2.

another meaning consistent with the framer's intent must be found. *Ante*, footnote 8, and the citations therein.

Under the rule in Shelly's Case, a limitation of an estate to an ancestor for life, with the remainder to his heirs or the heirs of his body, gave the whole estate in fee to the ancestor. 31 *Corpus Juris Secundum*, Estates § 4. This rule applies only where the estate in freehold and the estate in remainder are created by the same instrument as in the Preamble. *People v. Emery*, 314 Ill. 220, 145 N.E. 349; 69 C.J.S. p. 512, note 77. Again, because this is inconsistent with the known intent of the framers, another meaning must be found. *Ante*, footnote 8, and the citations therein.

An estate tail may, under certain circumstances, be created or arise by implication. *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409; *Haward v. Howe*, 12 Gray (Mass.) 49; *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162; *Gay v. Scates*, 37 Pa 31; *Larew v. Larew*, 146 Va. 134, 135 S.E. 819. Such a situation commonly arises if a conveyance[15] or devise in fee has been made to some particular person named without issue, upon an indefinite failure of issue. In other words, whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of decent; so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail, or fee tail. 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925; *Anderson v. United Realty Co.*,

[15] The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amend IV (Secure in their persons, houses);Amend V (nor be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation ....).

79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (recognizing by *dictum* that this rule was followed at common law).

The Statute of De Donis[16] made fee tails unalienable by using the words "to A and the heirs of his body." In 1472, Taltarum's Case virtually abolished tails for most purposes. Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25. An estate in tail was not subject to The Rule Against Perpetuities because it was a present future interest. See, 13 Edw. I, c. 1; Y.B. 12 Edw. IV. Mich., fo 14 b, pl. 16., fo. 19a, 25. Hence it is reasonable to infer that in lieu of the common law formulation the framers chose "to ourselves and our Posterity" to effectuate their intent that the "first takers should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure". This construction would carry out and effectuate the intent of the framers that the rights conferred be "unalienable", and to create a perpetual union. *Ante*, footnote 8, and the citations therein.

II. Posterity, including a fetus, has Presently Enforceable Rights

There are three points in time when one could cross the threshold of being "our selves" (present interest) from "posterity" (Presently enforceable future interests): conception; at birth; at age of capacity. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

Implicit in the Preamble is the concept that the Constitution is to be a social contract. Eg, Hobb, Leviathan (1651); Locke, Second Treatise of Government (1690); Laqueur, The Human Rights Reader. It was submitted to the People for ratification. 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; Amicus Appendix. 3 Rotunda, op cit, p. 663, note 1. Thus it is

[16] 13 Edw. I, c. 1.

implicit that acceptance could only be by those not suffering from a disability, ie., persons with the capacity to consent. R. Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967). Viewed as a social contract, the Individual in general promises the individual in particular to secure for him inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate[17] from the promise of inalienable rights. Such mutual promises have always been considered sufficient consideration for enforceability. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

As persons who have not reached the age of capacity[18] could not consent, Chitty, op. cit., it would appear that adults are of the class "our selves," and all others of the class "Posterity."

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925; 17 Halbury's Laws of England (1st ed, 1911), Infants ¶¶ 132, 135. Thus, it is clear that at common law that at least those members of

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[17] Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law, 60 AJIL 55 (1966);*.

[18] The 22nd Amendment provides: "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation." Arguably, without this provision, any "person born in the United States or under its jurisdiction" is a citizen, and could vote regardless of age. In practice, age was regulated by the States, and it was understood to be the common law age of maturity, unless modified by the respective states. 3 Rotunda, op. cit., p. 688, Historical Note.

Posterity who were born had a presently enforceable right.

Turning to whether a fetus, as a member of Posterity, had a common law protectable interest, it appears in the affirmative. As already noted, ante p. 11 citing Lord Coke, while it is was not murder to kill a child in a mother's womb, it was still a misprision (crime)!. The unborn was a life in being for purposes of the rule against perpetuities. Gray, op.cit. Moreover, it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

It thus appears that in view of the known object and intent of the framer's that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include within the class of persons protected the unborn conceived fetus.

I. A fetus is life within the meaning of the 5th Amendment

The Constitution provides, in relevant part:

> "No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *Eg, Flash v. Cohen*, 392 U.S.83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Assuming, *arguendo*, that the fetus is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135, to be heard on the question as to whether its life should

be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

It would appear that a fetus has all of the characteristics of life:[19] excretion,[20] ingestion,[21] respiration,[22] irritation,[23] and reproduction.[24] A zygote (early fetus) is viable, in contradistinction to the ovum and sperm which are not.[25] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Moreover, even a fetus securely within the womb will die if there is an abruption of the placenta.[26] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore made, that Posterity includes all future generation,

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[19] Biology: Observation & Concept by Case & Steirs (1971), p. 110.

[20] Id, pp. 122, 141, 143, 149-150;.

[21] Id, pp. 70, 80.

[22] Id, pp. 8, 51, 64, 77.

[23] Id, irritation, pp. 267, 329, 330;.

[24] Id, reproduction, pp. 122, 163-165, 298-299, 327, 329;.

[25] Id, pp. 324-327.

[26] Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93;.

with the conceived having a presently protectable interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

Therefore, the fetus is a life which may not be taken without due process of law, and a compelling, legitimate governmental interest.[27] *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

III

A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE, AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL

Under International Law, a State has the obligation to provide police protection of its citizens at home. Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966). The concept to protect a person from due process in A ican Jurisprudence is derived from the *Magna Carta* (1215). McKechnie,[28] *Magna Carta*; the Great Charter of King John. The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment. *Generally, Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

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[27] Because a fetus is a person, the State has an interest in protecting that life, and it therefore becomes a balancing test weighing the interest of the mother against that of the fetus. It would appear then that the life of the fetus could be terminated only if it threatens the life of the mother, because other alternatives are now available such as transferring the zygote to the womb of a willing carrier or mother.

[28] McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw 1 (*Magna Carta*)(1297), p. 14, Notes, ¶ 2.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, Ohio has a legitimate interest in providing for the protection of fetal life. It's citizens, and the citizen's of every state has an interest in insuring that there exists safeguards to insure that abortion does not become a tool for genocide. Eg, International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).

This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self defense. Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb to womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

There is another point to consider; the minor woman. As persons who have not reached the age of capacity[29] could not consent, Chitty, op. cit. If an adult does not have an absolute right to abortion, *a fortiori* neither does a minor female. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132 (1976), and *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979), relied primarily upon *Roe*. But as *Roe* stands on quicksand for *holding* that a woman has an unqualified right to abortion, those opinion are similarly flawed. *Wesbster*.

[29] See footnote 14, supra.

But even more is at stake. We are dealing with minors, and nearly every state has laws which make it statutory rape to have carnal knowledge of a female under age, or incest or child abuse if done by a family member. The courts are littered with cases where one parent or the other, have sold children into prostitution for drug money, or other reasons. How is the state to but an end to that evil crime, statutory rape, or incest, if there is no notification to anyone? It cannot, and thus the state has been hampered in its role of providing police protection of its citizens at home in the enforcement of its penal laws. All that *Bellotti II held* was that parents cannot have a veto power, and therefore alternative procedures for obtaining consent were constitutionally required. The Minnesota statute does not confer veto powers on the parent. It only requires notifica-tion so that if there is a problem, a person interested in the health and welfare of the minor can but an end to the abuse.

Based on the foregoing, Minnesota's statutes and regulations which do nothing more than to insure at the minimum that both parents have actual notice of the abortion, without involvement of the courts carries out its basic duties under International law and the U.S. Constitution. It does not absolutely bar abortions, but does insure that life is not arbitrarily taken,[30] and it furthers the state interest in

[30] Indeed, arguably Minnesota, misled no doubt by *Roe*, has not gone far enough in the protection of fetal life because it allows the taking of the fetal life without any hearing whatsoever. But that issue is not now before the court, although under *Brown I* and *Brown II*, this Court could, and probably should, consider that issue as well.

protecting expectant mothers from a potentially abuse environment in the home.

CONCLUSION

Based upon the foregoing, this court should *overrule Roe v. Wade*, 410 U.S. 113 (1973) prospectively, *reverse* the decision of the Eighth Circuit at 853 F.2d 1452 as to the constitutionality of subdivsion 2 of Minnesota Statute §§ 144.343 (1987), and remand for further proceedings not inconsistent with this Court's opinion.

Dated: August 27, 1989

Respectfully submitted,

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EXCERPTS FROM

2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

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[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

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VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

1.

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[163]

COMMITTEE OF DETAIL, IX

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IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the

same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

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[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

*****

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled,and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

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[604]

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[To postpoine the report respecting the 22nd and 23rd --- 9; noes --- 1.] Ayes

*****

To strike out the word "to" before establish justice --- 8; bites --- 2,] Ayes

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

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[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

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[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

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[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****